Filed 8/5/15 P. v. Warren CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ADE JESSIE WARREN, Defendant and Appellant.	D067416 (Super. Ct. No. SWF1200636)

APPEAL from a judgment of the Superior Court of Riverside County, Michael J. Rushton, Judge. Affirmed in part as modified; reversed in part.

Corona & Peabody and Jennifer Lynne Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland and Collette Catherine Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found Ade Jessie Warren guilty of second degree murder (Pen. Code, § 187, subd. (a))[1] (count 1) and gang participation (§ 186.22, subd. (a)) (count 2). With respect to the murder charge, the jury also found true a gang sentence enhancement (§ 186.22, subd. (b)) and a gang related firearm enhancement (§ 12022.53, subd. (e)). The trial court sentenced Warren to an aggregate term of 40 years to life in prison. On count 1 (murder), the trial court imposed an indeterminate term of 15 years to life for the underlying offense and 25 years to life for the gang related firearm enhancement. On count 2 (gang participation), the court imposed a term of two years and stayed execution of the sentence pursuant to section 654. The court also imposed a restitution fine in the amount of $280 (§ 1202.4), which the court described as the "minimum restitution fine."

On appeal, Warren claims that the trial court erred in permitting the People to present evidence of an excessive number of gang predicate offenses,[2] including Warren's prior gang related juvenile adjudication. Warren also contends that there is insufficient evidence in the record to support his conviction for gang participation (count 2) because

---

1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

2 The term "predicate offenses" is commonly used to "describe the component crimes that constitute the statutorily required 'pattern of criminal gang activity' " (*People v. Gardeley* (1996) 14 Cal.4th 605, 610, fn. 1), necessary to support a conviction or sentence enhancement pursuant to section 186.22.

there is no evidence that he committed the murder with another gang member, as is required. Finally, Warren claims that the $280 restitution fine must be modified in accordance with the trial court's stated intention to impose the statutory minimum, which was $200 rather than $280.

We conclude that the trial court did not abuse its discretion in permitting the People to present evidence of five gang predicate offenses, including Warren's prior juvenile adjudication. We further conclude that there is insufficient evidence to support Warren's conviction for gang participation because there is no evidence that he committed the murder with another gang member. We also modify the restitution fine in accordance with the trial court's stated intention to impose the applicable statutory minimum, and modify the judgment to impose a corresponding parole revocation fine (§ 1202.45) in the same amount. Accordingly, we reverse the conviction on count 2 (gang participation), modify the restitution fine, impose a parole revocation fine, and affirm the judgment in all other respects.[3]

---

3 We also direct the trial court to make various corrections to the abstract of judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The People's evidence*

a. *The altercations on the afternoon of the murder*

On the afternoon of the murder, Ezequial Ruedas was on the front porch of his home in a neighborhood in San Jacinto, with his friend Anthony Valdies. At approximately 3:00 p.m. that day, a group of young men approached Ruedas and Valdies. One of the men, whom Ruedas recognized as "Junior" (Norris Tremble), started yelling the name of Tremble's gang, L-Squad. Tremble also said, "Fuck San Jacinto," a reference to a rival gang, and directed several racially derogatory comments toward Ruedas.

At some point during the altercation, Ruedas called his neighbor, victim Fernando Villarino, on the telephone. Villarino and his cousin, Victor Chavez, came outside and watched the altercation from across the street.

Ruedas angrily told Tremble that he was not a member of the San Jacinto gang and to get away from his fence. Tremble tried to get Ruedas to come outside of his yard and fight. Ruedas refused, but challenged Tremble to come inside his yard to fight. Tremble's group eventually walked away. L-Squad gang members Javohn Milne and Warren were among those who were with Tremble during the altercation.

About 20 or 30 minutes later, Tremble's group walked by Ruedas's residence again and made several additional derogatory comments. After approximately 30 more minutes, the group walked by a third time, and uttered several racial slurs and gang related insults.

b. *The arrests preceding the murder*

At approximately 6:40 that evening, police detained five L-squad gang members near the scene of the altercations: Tremble, Warren, Milne, Andre Banks, and Jacob Cramer. Tremble was arrested after an officer observed him making racial slurs and threatening Villarino. Warren, Milne, and Banks were released at the scene. Cramer was arrested for providing false information to a police officer. Cramer and Tremble were in police custody at the time of the murder.

c. *The final altercation preceding the murder*

At approximately 7:15 p.m., a group of men, which included Milne and Warren, returned to the area, and directed additional racial slurs and gang related statements toward Ruedas and Chavez. According to Ruedas, some older men, who were not present during the earlier altercations, were with Milne and Warren. Ruedas, Valdies, Villarino, Chavez, and two friends of Chavez (Juan Sanchez and Marcelino Robles),[4] chased the group out of the neighborhood.

---

4 Robles was a member of the San Jacinto gang.

d. *The murder*

Around 8:30 p.m. that evening, Warren returned to the scene of the earlier altercations, walking up the middle of the street. Ruedas saw a second man on the left side of the street, and a third man on the right side of the street. Ruedas could not describe the two men because they stayed behind Warren and it was dark. Chavez, Sanchez, Robles, Ruedas, Villarino, and Valdies walked toward Warren.

According to Ruedas, Warren called out, "'Well, let's do this then,'" and Chavez answered, "All right, let's do it." Warren reached into his waistband, pulled out a gun, and began firing. Chavez saw Villarino get hit and fall to the ground.

e. *The investigation*

Police responded to the shooting at 8:37 p.m. Villarino was lying partially on the sidewalk and partially on the street. He had been shot in the head and the left arm, and was pronounced dead at the scene.

Eight nine-millimeter shell casings were found in the middle of street, approximately 152 feet from Villarino. In addition, three nine-millimeter casings were found farther south down the street. Two .45-caliber casings were also found on the south side of the street. The groupings of the casings were consistent with the possibility that there was another shooter in addition to Warren.

Ruedas, Chavez and Valdies each identified Warren in a photographic lineup.

f. *Gang evidence*

Senior District Attorney Investigator David Hankins testified as a gang expert. According to Investigator Haskins, L-Squad and San Jacinto have a history of violence between the two gangs dating back to the early 2000s. Investigator Haskins explained that the rivalry is partially racial, and that L-Squad members are "motivated by the hatred of Hispanics." Haskins stated that in his opinion, a hypothetical murder based on the facts of this case would have been committed for the benefit of L-Squad.

2. *The defense*

Warren presented an alibi defense through three witnesses who testified that he was with them, and not at the scene of the shooting, at the time of the murder.

B. *Procedural background*

The People charged Warren with first degree murder (§ 187, subd. (a)) (count 1) and gang participation (§ 186.22, subd. (a)) (count 2). With respect to the murder, the People alleged a gang special circumstance (§ 190.2, subd. (a)(22)), a gang sentence enhancement (§ 186.22, subd. (b)), a gang related firearm enhancement (§ 12022.53, subd. (e)), and a personal use firearm enhancement (section 12022.53, subd, (c)).

A jury found Warren not guilty of first degree murder (§ 187, subd. (a)), but guilty of the lesser included offense of second degree murder (count 1).[5] The jury also found Warren guilty of gang participation (§ 186.22, subd. (a)) (count 2). With respect to the

---

[5] In light of its verdict of not guilty on the charge of first degree murder, the jury did not render a verdict on the gang special circumstance allegation.

murder, the jury found true both the gang sentence enhancement (§ 186.22, subd. (b)) and the gang related firearm enhancement (§ 12022.53, subd. (e)). The jury found that Warren had not personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c). The trial court sentenced Warren to an aggregate term of 40 years to life in prison.

III.

DISCUSSION

A. *The trial court did not err in permitting the People to present evidence of five gang predicate offenses, including Warren's prior juvenile adjudication*

Warren claims that the trial court erred in permitting the People to present evidence of an excessive number of gang predicate offenses. Warren also contends that the trial court erred in admitting evidence of his prior gang related juvenile adjudication as among the predicate offenses. He maintains that the court should have limited the number of predicate offenses and precluded the People from presenting evidence of his own adjudication pursuant to Evidence Code section 352 because the probative value of the evidence was substantially outweighed by the possibility of prejudice.

We review the trial court's rulings pursuant to the abuse of discretion standard of review. (See, e.g., *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436 (*Rivas*) [applying abuse of discretion standard of review to defendant's contention that trial court erred in permitting prosecution to introduce evidence of excessive number of predicate gang offenses]; *People v. Tran* (2011) 51 Cal.4th 1040, 1050 (*Tran*) [applying abuse of

discretion standard of review to defendant's claim that trial court erred in admitting evidence of his prior conviction for purposes of proving gang predicate offense].)

1. *Governing law*

a. *Gang evidence*

i. Relevant statutory provisions

The People sought to introduce the gang predicate offense evidence for several purposes, including proving the gang sentence enhancement alleged with respect to count 1 (§ 186.22, subd. (b)), the substantive crime of gang participation (§ 186.22, subd. (a)) (count 2), and the gang special circumstance allegation alleged with respect to count 1 (§ 190.22, subd. (a)(22)). The sentence enhancement (§ 186.22, subd. (b)), crime (§ 186.22, subd. (a)), and special circumstance (§ 190.22, subd. (a)(22)), each were contingent upon the People proving the existence of a *criminal street gang*.[6]

---

6 Section 186.22, subdivision (a) provides in relevant part, "Any person who actively participates in any *criminal street gang* with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . ." (Italics added.)

Section 186.22, subdivision (b) provides a sentence enhancement for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any *criminal street gang*, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (Italics added.)

Section 190.2, subdivision (a)(22) provides for a special circumstance of life without the possibility of parole where a defendant commits a first degree murder in a case in which "[t]he defendant intentionally killed the victim while the defendant was an active participant in a *criminal street gang*, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang." (Italics added.)

A "*criminal street gang*" is statutorily defined as an "ongoing organization, association, or group of three or more persons . . . having as one of its primary activities the commission of" certain statutorily prescribed offenses, "having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a *pattern of criminal gang activity*." (§ 186.22, subd. (f), italics added.)

A " '*pattern of criminal gang activity*' means the commission of, attempted commission of, or solicitation of, sustained juvenile petition for, or conviction of two or more" statutorily specified offenses within a prescribed time frame, "on separate occasions, or by two or more persons." (§ 186.22, subd. (e), italics added.) This pattern of criminal activity is commonly referred to as "predicate offenses." (See, e.g., *People v. Gardeley*, *supra*, 14 Cal.4th at p. 610.)

ii. Relevant case law

With respect to the introduction of evidence of a predicate offense committed by the defendant, "[a] predicate offense [may] be established by proof of an offense the defendant committed on a separate occasion." (*Tran*, *supra*, 51 Cal.4th at p. 1046.) Further, with respect to the number of predicate offenses introduced, "[A]lthough the court need not limit the prosecution's evidence to one or two separate offenses lest the jury find a failure of proof as to at least one of them, the probative value of the evidence inevitably decreases with each additional offense, while its prejudicial effect increases, tilting the balance towards exclusion." (*Id*. at p. 1049.)

In addition to proving a section 186.22 offense or sentence enhancement, "[e]vidence of the defendant's gang affiliation . . . can [also] help prove . . . motive, . . . specific intent, . . . or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

b. *Evidence Code section 352*

Evidence Code section 352 provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

2. *Factual and procedural background*

a. *Pretrial proceedings*

Prior to the trial, the People filed a brief in which they requested permission to present evidence of nine predicate offenses, including a single prior juvenile adjudication involving Warren. The defense filed a brief requesting that the court conduct an in limine hearing to consider the People's request to admit the gang related evidence.

At a pretrial hearing, the court considered whether to permit the People to present this evidence. The court began by clarifying with the prosecutor that the law required the People to present at least two predicate offenses for purposes of proving the "pattern of criminal street gang activity" element of section 186.22, subdivision (e). The following colloquy then occurred:

> "The court: The question I have for you is, I can understand why you . . . want or need more than two, but nine seems like a pretty big number.
>
> "[The prosecutor]: I understand. Of course, I want to make sure, and I never know when I'm sure that the jury is absolutely convinced beyond a reasonable doubt that these elements of the gang are met, but having said that, I can identify three, that I would be willing to reduce this [*sic*] if the Court does feel like it's cumulative to have nine."

After further discussion between the prosecutor and the court during which the prosecutor stated that the L-Squad gang had been found to be a criminal street gang on only one other occasion, the following colloquy occurred:

> "The court: My point is . . . I think more than two is appropriate. So the question is how much is appropriate? So . . . I think five to six is an appropriate number. It gets you to more than two. It's substantially more than two. But taking into account Evidence Code section 352, I think it balances out issues related to the undue consumption of time, the concerns related to creating a substantial danger of undue prejudice or confusing the issues or misleading the jury. So I'd like to see you narrow the number down to five or six. What[is] your position on that, [defense counsel]?
>
> "[Defense counsel]: I think three is sufficient. But I will—obviously you are the judge, so you get to make that decision.
>
> "The court: I don't think there is an exact right number. But to say that more than two should be limited to three, I think [that] is unduly limiting on the [People] and allows the defense to kind of say there is not that much here. On the other hand, I could go to nine. I think nine is on the heavy side. So again, five or six, I think is an appropriate number, and I'll allow you to use five or six."

The prosecutor then identified three of the nine L-Squad predicate offenses that he would not present evidence of at trial in light of the court's ruling.

The court proceeded to address the People's request to present evidence of Warren's prior juvenile adjudication among the predicate offenses. Defense counsel indicated that the People had evidence of numerous other predicate offenses with which to establish the pattern of criminal gang activity and argued that the People were attempting to "sully [Warren's] character" by introducing evidence of the juvenile adjudication. Defense counsel argued that the evidence should be excluded because it was "overly prejudicial."

The prosecutor responded by arguing that the adjudication was not relevant merely as a gang predicate offense. The prosecutor noted that the adjudication was highly probative with respect to two required elements of the section 186.22, subdivision (a) charge, namely, that Warren was an active participant in the gang and that he had knowledge that the gang engaged in a pattern of criminal gang activity. The prosecutor also described the facts of the juvenile adjudication, noting that it involved Warren being found in possession of a firearm together with several other L-squad gang members, shortly after a witness overheard the group talking about shooting members of the rival San Jacinto gang. The prosecutor noted further that the incident underlying the juvenile adjudication occurred approximately one week after Warren's "big homie," Jerome Lewis,[7] was murdered by San Jacinto gang members. The prosecutor contended that the background facts of the adjudication were therefore relevant in establishing Warren's

---

7 At trial, the People's gang expert testified that Lewis was a "highly respected" L-Squad gang member.

motive to avenge Lewis's death by committing the murder, and in demonstrating that Warren committed the murder for the benefit of the gang in order to prove the section 186.22, subdivision (b) sentence enhancement.

After a lengthy discussion among court and counsel concerning the admissibility of Warren's juvenile adjudication,[8] the trial court ruled that the People would be permitted to present evidence of the adjudication as well as a sanitized version of the facts of the underlying offense that would omit any reference to evidence that a witness heard Warren's group discussing shooting members of the San Jacinto gang.

b. *Trial evidence*

At trial, the People's gang expert, Investigator Haskins, testified with respect to four predicate offenses that Warren's fellow L-squad gang members had committed. The offenses included two attempted murders, a murder, and a felon in possession of a firearm. For each offense, Investigator Haskins outlined the date of conviction and the type of crime, as well as evidence tending to demonstrate that the perpetrator was an L-squad gang member.

Investigator Haskins also testified concerning Warren's prior juvenile adjudication. Haskins stated that Warren had admitted an allegation in a juvenile court petition that he possessed a firearm while being an active participant in the L-Squad gang. Investigator

---

8 During the discussion, the trial court mentioned the possibility of the court providing a limiting instruction concerning the jury's consideration of the gang evidence.

Haskins also briefly described the facts of the January 23, 2009 incident underlying the adjudication by stating:

> "Multiple officers respond[ed] to an apartment complex near Tiger Lane.[9] Numerous L-squad members were contacted and a shotgun was recovered from the area where the L-squad members were standing next to."

Investigator Haskins explained that this incident occurred just six days after members of the rival San Jacinto gang had murdered a "highly respected" L-Squad gang member named Jerome Lewis. Investigator Haskins stated that Lewis's moniker was "Big Chop," that Warren's moniker was "Lil' Chop," and that these facts supported Haskins's opinion that Warren was an L-Squad gang member.

c. *Limiting instruction*

The trial court instructed the jury that it could consider "evidence of gang activity" for certain limited purposes, including whether Warren had "acted with the intent, purpose, and knowledge that are required to prove the gang related crimes, enhancements, and special circumstances," and whether Warren had "a motive to commit the crimes charged." The instruction also informed the jury that it was not permitted to conclude from the gang evidence that "[Warren] is a person of bad character or that he has a disposition to commit crimes."

---

9 Investigator Haskins testified that the L-Squad gang "claim[s]" 100 North Tiger Lane as "their own." The murder occurred near Tiger Lane.

3. *Application*

a. *The trial court did not err in permitting the People to present evidence of five gang predicate offenses*

Warren makes two primary arguments in support of his contention that the trial court abused its discretion in permitting the People to present evidence of five gang predicate offenses.[10] First, Warren contends that the trial court erred in permitting the People to present evidence of five predicate offenses because the "prosecutor on *its own initiative, offered* to *reduce* the number of predicate offenses down from nine to *three* if the court felt the nine would be cumulative." We are not persuaded that the prosecutor made any such offer. As noted above, in discussing the number of predicate offenses to be offered, the prosecutor stated:

> "I want to make sure, and I never know when I'm sure that the jury is absolutely convinced beyond a reasonable doubt that these elements of the gang are met, but having said that, I can identify three, that I would be willing to reduce this [*sic*] if the Court does feel like it's cumulative to have nine."

Although the prosecutor's statement is somewhat ambiguous, the most reasonable interpretation of the statement is that the prosecutor would be willing to reduce the number of predicate offenses *by three* from nine to six, *not* that he was offering to present evidence *of only three* predicate offenses. This interpretation of the prosecutor's statement is bolstered by the fact that there is nothing in the remainder of the discussion

---

10 Although the trial court ruled that it would allow the People to present evidence of "five or six" predicate offenses, the People offered evidence of just five predicate offenses at trial.

of this issue in the trial court that suggests that the court, the prosecutor, or defense counsel believed that the prosecutor had offered to limit himself to presenting evidence of only three predicate offenses. We therefore reject Warren's contention that the trial court abused its discretion by failing to accept the prosecution's "offer[] to reduce the number of predicate offenses down from nine to three." (Italics omitted.)

Warren also contends that the trial court abused its discretion in refusing to limit the prosecutor to evidence of three predicate offenses because permitting the prosecutor to offer evidence of five such offenses was cumulative. The trial court carefully considered the issue and limited the number of offenses as to which the People would be permitted to present evidence. (See III.A.2.a., *ante*.) The trial court reasonably determined that further limitation might unfairly prevent the prosecutor from establishing elements of the People's case that required proof of the existence of a pattern of criminal gang activity. Further, the testimony concerning the predicate offenses was not of significant duration. Under these circumstances, we conclude that the trial court did not abuse its discretion in permitting the People to present evidence of five gang predicate offenses. (See, e.g., *Rivas*, *supra*, 214 Cal.App.4th at p. 1436 [concluding trial court did not abuse its discretion in permitting People to present evidence of six gang predicate offenses].)

b. *The trial court did not err in permitting the People to present evidence of Warren's prior juvenile adjudication*

Warren claims that the trial court erred in permitting the People to present evidence of his prior juvenile adjudication in which he admitted an allegation that he possessed a firearm while being an active participant in the L-Squad gang. Warren contends that evidence of the adjudication had "minimal probative value," and that the admission of such evidence was "extremely prejudicial." We are not persuaded.

The prior juvenile adjudication was highly probative as to numerous issues in the case. For example, the adjudication was relevant as a gang predicate, in establishing that Warren was an active participant of L-Squad, and in proving that Warren had knowledge of the gang's criminal activities. (See *Tran, supra*, 51 Cal.4th at p. 1048 ["that the defendant committed a gang related offense on a separate occasion provides direct evidence of a predicate offense, that the defendant actively participated in the criminal street gang, and that the defendant knew the gang engaged in a pattern of criminal gang activity"].)

The underlying facts of Warren's juvenile adjudication were also relevant to establish Warren's motive for committing the charged offense and to show that he committed the murder for the benefit of the gang. We reject Warren's contention that the evidence was "minimally probative in light of the other evidence" offered to prove these issues. Evidence that Warren had committed a gang related crime that demonstrated the

gang rivalry that constituted the motive for the charged crime was uniquely probative evidence on these issues.

Indeed, Warren notes that "[e]vidence that, on another occasion, appellant had assembled with other 'L-Squad' gang members, armed with a firearm, six days after the death of a highly-respected 'L-Squad' member, whose moniker appellant pays homage, was highly damaging." We agree. However, the fact that the evidence was damaging does not demonstrate that it should have been excluded as substantially more prejudicial than probative pursuant to Evidence Code section 352. " ' "The prejudice that [Evidence Code] section 352 ' "is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." ' " ' " (*Tran, supra*, 51 Cal.4th at p. 1048.) In any event, "the prosecution cannot be compelled to ' "present its case in the sanitized fashion suggested by the defense." ' " (*Id.* at p. 1049.)

Finally, with respect to the potential for prejudice, the trial court excluded the most inflammatory detail of the juvenile adjudication (i.e. that a witness had heard Warren's group discussing shooting San Jacinto gang members) and provided a limiting instruction with respect to the jury's consideration of all the gang evidence. Under these

circumstances, we conclude that the trial court did not err in permitting the People to present evidence of Warren's prior juvenile adjudication.[11]

B. *There is insufficient evidence in the record to support Warren's conviction for gang participation because there is no evidence that Warren committed the murder with another gang member, as is required*

Warren contends that there is insufficient evidence in the record to support his conviction for gang participation (count 2) (§ 186.22, subd. (a)) because there is no evidence that Warren committed the murder with another gang member, as is required.

1. *Standard of review*

"A state court conviction that is not supported by sufficient evidence violates the due process clause of the Fourteenth Amendment and is invalid for that reason." (*People v. Rowland* (1992) 4 Cal.4th 238, 269, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 313–324 (*Jackson*).) In determining the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson, supra*, at p. 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it

---

11 Warren claims that the trial court's alleged error in admitting the evidence violated his constitutional right to due process by rendering the trial fundamentally unfair. In light of our conclusion that the trial court did not abuse its discretion in admitting the evidence, it necessarily follows that the court did not violate Warren's constitutional right to due process by admitting the evidence. (See, e.g., *People v. Benavides* (2005) 35 Cal.4th 69, 93 ["Defendant further claims the introduction of this percipient evidence violated his right to due process under the Fourteenth Amendment to the federal Constitution. This claim fails because, as we have concluded, the evidence was properly admitted"].)

discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

2. *Governing law*

"The elements of the gang participation offense in section [186.22, subdivision (a)] are: First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by *members* of that gang." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*).)

In *Rodriguez*, the Supreme Court interpreted the third element of section 186.22, subdivision (a) and stated, "[T]o satisfy the third element, a defendant must willfully advance, encourage, contribute to, or help *members* of his gang commit felonious criminal conduct." (*Rodriguez, supra*, 55 Cal.4th at p. 1132.) The court also concluded, "The plain meaning of section [186.22, subdivision (a)] requires that felonious criminal conduct be committed *by at least two gang members*, one of whom can include the defendant if he is a gang member." (*Rodriguez, supra*, at p. 1132, italics added; see also *id*. at p. 1138 ["with section [186.22, subdivision (a)], the Legislature sought to punish gang members who acted *in concert* with other gang members in committing a felony"].)

Although the defendant in *Rodriguez* had acted alone in committing the underlying offense, the Supreme Court made clear that a gang member does not violate

section 186.22, subdivision (a) by committing a crime with the assistance of another person, *unless* the other person is a gang member. (See *Rodriguez, supra,* 55 Cal.4th at p. 1138 [discussing hypothetical in which a leader of a gang is assisted by another person in committing several shootings and stating that if the other person is *not* a gang member then neither the gang leader nor the other person is guilty of violating section 186.22 subdivision (a) because "only one member of the gang—the gang leader—committed the shootings"]; accord *People v. Vega* (2015) 236 Cal.App.4th 484, 504 ["[o]ne of the people who engaged in the felonious conduct (in addition to defendant) must have belonged to the same gang in which defendant is an active participant"].)

3. *Application*

The People acknowledge that, pursuant to *Rodriguez*, in order to prove that Warren violated section 186.22, subdivision (a), they were required to prove that he committed the murder with another gang member. The People also acknowledge that the "witnesses were unable to see the others who accompanied [Warren] at the scene of the shooting."[12] Further, it is undisputed that the People were unable to present *any* evidence at trial with respect to the identities of the persons who accompanied Warren to the scene of the murder, and there is no *other* evidence in the record demonstrating that

---

12 During his opening argument, the prosecutor described the state of the evidence concerning the identities of the people who were with Warren at the time of the murder as follows, "Behind [Warren] are several other black males, that to this day we're not certain [*sic*] and they're not identified." During his closing argument, the prosecutor asked the rhetorical question, "W[ere] the witness[es] able to identify other participants in the crime?" The prosecutor responded, "No."

the persons who accompanied Warren to the murder were gang members. For example, there was no evidence presented at trial that the persons who accompanied Warren yelled gang slogans, flashed gang signs, or wore gang attire. The People presented no other physical or testimonial evidence demonstrating that the persons who accompanied Warren to the shooting were gang members.

The People contend that, because the shooting was preceded by several altercations between the victim and a group of L-Squad gang members earlier in the day, the "jury could properly infer that the men accompanying [Warren] less than two hours [after the last altercation] when the shooting occurred were also L-Squad gang members." The People's argument amounts to nothing more than speculation. While it is *possible* that the persons who accompanied Warren to the murder were actual L-Squad gang members, there is no *evidence* that this was so. It is also possible that the persons who accompanied Warren were not actual L-Squad gang members, but rather, were other individuals who were willing to support Warren and commit crimes on behalf of the gang.[13] However, *Rodriguez* makes it clear that in order to prove a violation of section 186.22, subdivision (a), the People were required to present evidence that the felonious criminal conduct was "committed by at least *two* gang members." (*Rodriguez, supra*, 55 Cal.4th at p. 1132, italics added.) In the absence of substantial evidence demonstrating

---

13 The prosecutor's gang expert testified that one manner by which an individual may obtain gang membership is to commit a crime on behalf of the gang.

that the individuals who accompanied Warren at the time of the shooting were L-Squad gang members, Warren's conviction for gang participation must be reversed.[14]

C. *The restitution fine must be modified in accordance with the trial court's stated intention to impose the statutory minimum and the judgment must be modified to impose a corresponding parole revocation fine in the same amount*

Warren claims that the trial court's imposition of a $280 restitution fine must be modified because the record is clear that the court intended to impose the $200 statutory minimum applicable in Warren's case.

At sentencing on September 24, 2013, the trial court stated, "I order defendant to pay the minimum restitution fine of $280."

At the time of Warren's commission of the September 8, 2011 offense, former section 1202.4 provided in relevant part:

> "(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.
>
> "(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, *but shall not be*

---

[14] As noted in part I, *ante*, with respect to the murder, the jury found true a gang sentence enhancement (§ 186.22, subd. (b)) and a gang related firearm enhancement (§ 12022.53, subd. (e)). Unlike the substantive offense of gang participation in section 186.22, subdivision (a), a sentence enhancement may be imposed under section 186.22, subdivision (b) without evidence that two gang members participated in the crime. (*Rodriguez, supra*, 55 Cal.4th at p. 1138.) Section 12022.53, subdivision (e) provides a sentence enhancement where the defendant "violated subdivision (b) of Section 186.22," and a principal in the offense committed certain firearm-related conduct. Warren does not claim on appeal that any insufficiency of evidence with respect to whether he committed the murder with another gang member affected the jury's findings on the sentence enhancements alleged with respect to count 1 (murder).

> *less than two hundred dollars ($200)*, and not more than ten thousand dollars ($10,000), if the person is convicted of a felony. . . ." (Stats. 2011, ch. 45, § 1, italics added.)

Effective January 1, 2012, section 1202.4, subdivision (b)(1) was amended to state in relevant part: " 'The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than . . . *two hundred eighty dollars ($280) starting on January 1, 2013* . . . and not more than ten thousand dollars ($10,000) . . . .' " (*People v. Kramis* (2012) 209 Cal.App.4th 346, 349, fn. 2, italics added.)

In imposing a restitution fine, a trial court is required to apply the "minimum [restitution fine] that was in effect when [an] appellant committed his crimes," rather than the "minimum statutory fine that was in effect at sentencing." (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1190.)

The trial court expressly stated its intention to impose the statutory minimum fine, which under the applicable law was $200. Because the court clearly stated its intent, we reject the People's argument that Warren "*speculates* the trial court intended to impose the minimum fine." (Italics added.) Under these circumstances, the proper remedy is for this court to modify the restitution fine from $280 to $200 in accordance with the trial court's stated intention to impose the statutory minimum. (See *People v. Guillen* (2014) 227 Cal.App.4th 934, 1032-1033 [modifying restitution fine to the statutory minimum

where trial court's statements at codefendants' sentencing hearings indicated that the trial court intended to impose statutory minimum fine as to all defendants].)[15]

Citing the abstract of judgment, Warren also contends that the trial court erred in imposing a $280 parole revocation fine (§ 1202.45). However, the reporter's transcript of the sentencing hearing indicates that the trial court failed to impose *any* parole revocation fine, as was required. (See § 1202.45 [stating that "in every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4."].) The trial court's failure to impose a parole revocation fine in an amount equivalent to the restitution fine constitutes an unauthorized sentence that may be corrected on appeal. (See *People v. Smith* (2001) 24 Cal.4th 849, 852-853 [stating that the Court of Appeal may correct the trial court's failure to impose proper parole revocation fine on appeal].)

Accordingly, we modify the restitution fine from $280 to $200 in accordance with the trial court's stated intention to impose the statutory minimum and modify the

---

15 In light of our modification of the restitution fine in accordance with the trial court's stated intention to impose the statutory minimum fine, we need not consider Warren's arguments that the imposition of a $280 fine would violate the ex post facto clauses of the state and federal constitutions and that trial counsel was ineffective for failing to correct the trial court's "mistaken belief about the minimum fine applicable to [Warren]."

judgment to impose a parole revocation fine in the same amount as the modified restitution fine, namely $200.

D. *Warren need not be resentenced, but the abstract of judgment must be corrected*

Although we have reversed the conviction on count 2 (gang participation), the trial court stayed the execution of the sentence on this count pursuant to section 654. Warren's sentence on count 1 thus is not affected by our reversal of his conviction on count 2 and he need not be resentenced.

However, in light of our reversal of the conviction on count 2, this conviction must be removed from the abstract of judgment. The abstract of judgment shall also be corrected to reflect our modification of the restitution fine from $280 to $200 and the imposition of a corresponding parole revocation fine of $200. Finally, the People correctly note in their brief that the abstract of judgment incorrectly states that the trial court imposed a *determinate* term of 25 years on the section 12022.53, subdivision (e) sentence enhancement on count 1. The abstract of judgment shall be corrected to reflect the trial court's imposition of an *indeterminate* term of 25 years to life on the section 12022.53, subdivision (e) sentence enhancement on count 1.

IV.

DISPOSITION

Warren's conviction on count 2 (gang participation) (§ 186.22, subd. (a)) is reversed. The restitution fine (§ 1202.4) is modified from $280 to $200 and the judgment

is modified to impose a parole revocation fine (§ 1202.45) in the amount of $200. In all other respects, the judgment is affirmed as modified.

The trial court is directed to prepare a new abstract of judgment in accordance with part III.D., *ante*, and to forward the new abstract of judgment to the Department of Corrections and Rehabilitation.

AARON, J.

WE CONCUR:

McDONALD, Acting P. J.

O'ROURKE, J.